

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMONT DEMOND FRIAR, JR.,

Defendant-Appellant.

UNPUBLISHED

October 17, 2013

No. 310002

Wayne Circuit Court

LC No. 11-004187-01-FC

Before: MURPHY C.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Defendant was found guilty of assault with intent to do great bodily harm less than murder (AIGBH), MCL 750.84, carjacking, MCL 750.529a, and possession of a firearm in the commission of a felony (felony-firearm), MCL 750.227b(1) following a jury trial. He was sentenced to concurrent terms of 15 to 30 years for carjacking and 6 to 10 years for AIGBH, and to a two-year consecutive term for felony-firearm. A mistrial was declared with respect to co-defendant Torreon Buchanan because the jury could not reach a verdict. Defendant appeals as of right. We affirm.

On January 16, 2011, at approximately 8:00 p.m., two men got out of a car and approached the vehicle of Angela Sammons as she was in her driveway preparing to go inside. One assailant, later identified by Angela and her husband as defendant Friar, approached the driver's side of the vehicle. The other, later identified by Angela as co-defendant Buchanan, approached the passenger side. Both had guns out and were tapping on the car windows. One of the men said "give me everything you got." Defendants also pulled on the handles of Angela's car, causing it to rock, and yelled at her to get out of the car. The men were wearing masks that covered part of their faces.

Angela locked her car doors. She saw her 13-year-old son open the front door of her house. Defendant turned his gun on the boy and told him to close the door. Defendant pulled his mask down as he said this, and the mask remained down for the rest of the incident. Angela testified that she could see his whole face except his chin. Defendant pointed his gun back at her, and both men continued pulling on the car door handles and tapping on the windows. Angela's husband, Carl Sammons, opened the front door to the house and defendant began shooting at him. Defendant was approximately 11 feet away from the door. Defendant and

Buchanan then backed toward their van. Buchanan was firing multiple shots at Angela and one hit the hood of her car.

The men continued to shoot as the van drove off and doubled back toward the house. Angela Sammons leaped or jumped into her house through the front door, cutting herself on broken glass. Inside, her four sons were shaking and frightened. Her husband lay on the living room floor with a shotgun wound to the abdomen. The bullet had lodged in the femur.

Angela and Carl Sammons described the assailants to police. Angela thought she described them as 5' 9" to 5' 11" tall, although police wrote the description as 5' 8" to 5' 10" tall. Defendant was actually taller, 6' 1" or 6' 2", while Buchanan was shorter, 5' 7" or 5' 8". Both men were described as black, one with a light brown complexion and the other with brown skin. They were wearing hooded sweatshirts but the hoods were not covering their heads. Angela did not describe their eye color, facial hair, or head hair, because police did not ask. Carl described defendant as 5' 8" to 5' 10" tall, with a medium complexion, short hair, and a mustache. The assailants' faces were illuminated by a porch light, Christmas lights, and neighbors' globe lights. There was a street light one house down.

Angela Sammons testified that, shortly after the incident, she was at home and went to read her e-mail on her smart phone. This was the first time she had logged on since the incident, because she had been at the hospital with her husband. Angela's home page was WDIV Click On Four. As she scrolled down to read her e-mail, she saw pictures of defendant and Buchanan and an article about them. The article was not about the attempted robbery at the Sammons home. Angela immediately recognized the men's faces and dropped her phone. When she picked it up, the faces were still there. The men's eyes, skin tone, hair lines, and haircuts were consistent with the robbers' features. She knew right away that they were the same men.

Angela later found defendants' photos on her laptop and took the laptop to Carl, who was in a wheelchair. Carl recognized defendant's photo on the laptop right away. He enlarged the photo and he and Angela called the police.

The officer in charge, Sergeant Marzette, spoke to Angela Sammons on the phone, consulting the Click On Four website as they talked. Marzette found the article and photos of defendants. He sent Officer Mott to the Sammons home on February 3, 2011, with photos to identify. The photo of defendant was different from the one on the Internet, and Mott's photos were in black and white, while the Internet photos were in color. Still, Angela and Carl Sammons identified defendant right away. Angela also identified Buchanan. Marzette testified that he did not do a photo show-up including other pictures, because Angela had previously seen photos of the robbers and police were just confirming her identification. No line up was done because the defendant would not cooperate with a line up.

Defendant filed a motion to suppress the identification. Defendant claimed that the photo identification procedure was so suggestive that it violated his right to due process. US Const, Ams V, XIV; Const 1963, art 1, § 17. The court denied the motion after an evidentiary hearing, finding that a mere happenstance identification not involving police did not require constitutional protections. Defendant was not in custody for the instant offense and thus did not have the right

to counsel at the photo show-up. Further, the court did not find the displaying of a single photo unduly suggestive.

On appeal, we review de novo rulings on questions of law and constitutional issues considered in a motion to suppress. *People v Keller*, 479 Mich 467, 473-474; 739 NW2d 505 (2007). The trial court findings of fact are reviewed for clear error. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005).

We find no reversible error in the trial court's denial of defendant's motion to suppress the complainants' photo identifications. A photographic identification procedure violates due process when it is "so impermissibly suggestive as to give rise to a substantial likelihood of misidentification." *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). Defendant bears the burden of proof on this issue. *People v Kurylczuk*, 443 Mich 289, 302; 505 NW2d 528 (1993); *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). When a witness is shown only one person or photo, the temptation arises to presume the person pictured is the criminal. *Gray*, 457 Mich at 111. "[E]xhibition of a single photograph is one of the most suggestive photographic identification procedures that can be used." *Id.* at 107 (citation omitted). But a one-person confrontation does not per se violate due process, *People v Hallaway*, 389 Mich 265, 282; 205 NW2d 451 (1973), and may be a reasonable police practice to allow an immediate decision whether the suspect is connected with the crime. *People v Winters*, 225 Mich App 718, 728; 571 NW2d 764 (1997).

Improper suggestibility may arise if one person is singled out in some way. In *People v McAllister*, 241 Mich App 466, 472; 616 NW2d 203 (2000), the Court observed, "the procedure itself was suggestive in that [the witness] was shown only one photograph of [the] defendant." The trial court's decision to admit the evidence was upheld in *McAllister*; the only photo the police could locate of the defendant showed him on a boat, and a photo show-up would have impermissibly singled out the defendant as the only person on a boat. The panel also found a sufficient independent basis for the in-court identification. Where a procedure is impermissibly suggestive, the prosecution must show by clear and convincing evidence that the in-court identification would have an independent basis. *Colon*, 233 Mich App at 304.

Numerous factors must be considered in determining whether an independent basis exists for admission of an in-court identification. *People v Gray*, 457 Mich at 115 n 10, quoting *Neil v Biggers*, 409 US 188, 199-200; 93 S Ct 375; 34 L Ed 2d 401 (1972). These factors were summarized in *People v Davis*, 241 Mich App 697, 702-703; 617 NW2d 381 (2000):

- (1) prior relationship with or knowledge of the defendant;
- (2) opportunity to observe the offense, including length of time, lighting, and proximity to the criminal act;
- (3) length of time between the offense and the disputed identification;
- (4) accuracy of description compared to the defendant's actual appearance;
- (5) previous proper identification or failure to identify the defendant;
- (6) any pre-lineup identification . . . of another person as the perpetrator;
- (7) the nature of the offense and the victims age, intelligence, and psychological state;
- and (8) any idiosyncratic or special features of the defendant.

In the present case, these factors favor a finding of independent basis for identifications by Angela and Carl Sammons. Neither had any prior relationship with defendant. However, Angela had a good opportunity to observe the offense and the defendant. He stood right outside her car window, probably for several minutes, and he talked to her and turned back and forth toward the front door of her house and her car door. The lighting was good for nighttime; there were two porch lights, Christmas lights, and the neighbors' globe lights illuminating the driveway and porch. The descriptions were apparently accurate except for defendant's height. Neither Angela nor Carl identified anyone else as the assailant. Both were very sure defendant was one of the robbers. The photo identifications took place only two and a half weeks after the crime.

Moreover, the complainants' identifications of defendant from an Internet photo were not subject to exclusion because these identifications were not procured under suggestive circumstances arranged by police. *Perry v New Hampshire*, ___ US ___, 132 S Ct 716, 718-720; 181 L Ed 2d 694 (2012). The *Perry* Court emphasized that a primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances was to deter improper lineups, show-ups, and photo arrays. State action was required. *Id.*

The same result was reached by Michigan courts. In *People v Metcalf*, 65 Mich App 37, 50; 236 NW2d 573 (1975), this Court upheld the trial court's ruling not to quash an in-court identification because of the victim's spontaneous identification of the defendant at the courthouse while filing her complaint. The defendant was being brought in for arraignment and the witness said, "There he is." *Id.* at 41. There was an independent basis for the in-court identification where the witness "observed [the] defendant at close quarters and in good light for several minutes." *Id.* at 44. Also, in a photo display, police had used 24 photos, all of which looked "remarkably similar to the defendant." *Id.* at 46.

Another case involving a spontaneous identification was *People v Hampton*, 52 Mich App 71, 76-77; 216 NW2d 441 (1974), rev'd on other grounds 394 Mich 437; 231 NW2d 654 (1975). In *Hampton*, the witnesses were present for jury selection and saw the defendant walking by near an elevator. This Court termed the witnesses' viewing "mere happenstance," an inadvertent confrontation. *Id.* at 77.

The instant case even more strongly presents a situation of "mere happenstance" when defendant and co-defendant Buchanan popped up on Angela Sammons's cell phone as she went to look at her e-mail. Angela estimated this occurred on January 24, 2011, eight days after the crime. Her response — dropping the phone and going "flying across the room" — showed genuine surprise, shock, and no hesitation. Carl Sammons, who had military training in facial identification, also recognized defendant's face right away. He enlarged the photos of the two men and Angela immediately called police. No state action occurred. Moreover, defendants had not been the focus of the investigation, and police apparently did not know whether they were in custody in Macomb County.

Sergeant Marzette found defendants' photos on the Click On Four website. On February 3, 2011, Officer Mott took photos of the defendants to the complainants' house. The photo of defendant was not the same; the photo of Buchanan was the same, except it was in black and white while the original photos were in color. Defendant argues that police should have taken

the exact photo Angela saw on the Internet, but, as the prosecution countered, then defendants would have argued that the February 3rd identification resulted from the January 24th identification and not from seeing the assailants during the January 16th crime. In any event, defendant has not cited authority that police were required to use the same photo. The jurors received all photos and it was within their province to decide what weight to give the various identifications. Both complainants' identifications of defendant were quite strong and certainly made before any state action took place.

Under the circumstances, we find that defendant was not denied due process by the police showing only one photograph to the complainants. The police apparently did not suggest that defendant and Buchanan were the assailants, but used a neutral question of "do you recognize this man?" The complainants both separately identified defendant "right away." Carl Sammons could not identify Buchanan because he did not see the second man during the assault. However, Carl saw defendant about 11 feet away, on a platform near the house, as defendant fired his weapon. Defendant's mask was off at this time. The totality of the circumstances showed that the complainants' in-court identifications were not tainted by the arguably improper procedure of showing them only one photo of defendant.

Affirmed.

/s/ William B. Murphy
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens